been accustomed to assert that soldiers in actual military service and sailors at sea may make wills of personalty at the age of 14, and it has been the practice of the English courts of probate to admit to probate the wills of soldier-infants. But, as Justice Younger points out, this rule and this practice originated in a case in which probate was granted on *ex parte* motion and without any adequate consideration.[7]

American text writers have been strangely silent on the subject. No discussion of the problem has been found in any of them. There is, however, one American decision which supports the view of Mr. Justice Younger.[8] It is believed that in this country as well as in England additional legislation will be necessary if soldiers or sailors are to have testamentary capacity at an earlier age than civilians.

WHAT IS COMMERCE?

It has been suggested in two legal periodicals[1] and held in two recent cases that interstate transportation of property by the owner for purely personal use is not interstate commerce. *United States v. Mitchell* (1917, S. D. W. Va.) 245 Fed. 601.[2] But inasmuch as there are at least two decisions squarely *contra*[3] and apparently none in accord, and inasmuch as the solution of the question goes to the very root of the whole commerce clause of the Constitution, the problem seems to be doubly worthy of consideration.

What, then, is commerce, or rather what is commerce in the sense in which that term is used in the Constitution? The specific aspect of this question as it arose in the principal case was whether the owner of intoxicants who personally carries the same from one state to another, not for purposes of trade but for personal use, is transporting intoxicants in interstate commerce. The court held that such a transaction is not interstate commerce for the reason that the term commerce *"necessarily connotes"* a business transaction. But does the term *commerce, in the sense in which it is used in the Constitution,* "necessarily connote" a so-called "commercial" transaction? It was argued in the leading case on interstate commerce that commerce was limited to traffic, but Mr. Chief Justice Marshall, speaking for the court, irrefutably answered the argument with the observation that *"this* [limitation] *would restrict a general term, applicable to many*

[7] *Re Farquhar* (1846) 4 Notes of C. 651; see also *Re M'Murdo* (1867) L. R. 1 P. & D. 540; Goods of Hiscock [1901] P. 78.

[8] *Goodell v. Pike* (1867) 40 Vt. 319.

[1] (1903) 3 COLUMBIA L. REV. 411; (1898) 12 HARV. L. REV. 353.

[2] The other case, from the Northern District of West Virginia, is unreported.

[3] *State v. Holleyman* (1899) 55 S. C. 207, 33 S. E. 366; *Alexander v. State* (1910) 3 Okla. Cr. 478, 106 Pac. 988.

objects, to one of its significations."[4] If, then, as the Supreme Court has repeatedly held, the term "commerce" as used in the Constitution "is a term of the largest import,"[5] and cannot be restricted "to one of its significations,"[6] it becomes important to ascertain what the "largest import" of the term is—what "its significations" are. According to the best authorities the word commerce has *two principal* "significations": (1) business intercourse, and (2) social or personal intercourse.[7] Moreover, this latter signification was the more widely developed in the early use of the word commerce and has ever since been quite common.[8] Furthermore, it may be appropriately observed that the word commerce comes from the Latin word *commercium* which, like its English derivative, has a double and very comprehensive meaning: (1) commercial intercourse, (2) non-commercial intercourse.[9] For example, the Romans spoke of a social exchange of letters as commerce (*commercium*),[10] and, in fact the word commerce is still used to convey that meaning or similar meanings.[11] The derivative word commercial, however, has been confined to only "one of the significations" of the root word commerce, *viz.*, to business transactions, and doubtless it is partly to this conception that the holding in the principal case must be attributed. But the power given to Congress was to "regulate *commerce*," not to "regulate *commercial* transactions." Therefore, to use again the language of Mr. Chief Justice Marshall, the holding in the principal case, if correct, would *"restrict a general term, applicable to many objects, to one of its significations,"*—such a restriction the great expounder of the Constitution held could not be made.

Such being the "large import" of the term, the next important question is whether in giving Congress the power to regulate interstate commerce the broad purpose—the evil sought to be remedied—is necessarily confined to purely business or so-called "commercial" transactions. "It is a matter of public history that the object of vesting in Congress the power to regulate interstate commerce was to insure uniformity of regulation against conflicting and discriminating state legislation.[12] Hence, the principal purpose of the commerce clause was to prevent interference by a state with the free interstate

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[4] *Gibbons v. Ogden* (1824, U. S.) 9 Wheat. 1, 189. Italics in the quotation are the writer's.

[5] *Welton v. State of Missouri* (1875) 91 U. S. 275, 280.

[6] *Gibbons v. Ogden, supra.*

[7] See Century Dictionary and Encyclopedia, and Webster's New International Dictionary.

[8] See Webster's New International Dictionary.

[9] See Harper's Latin Dictionary.

[10] *Id.* See, also, Seneca, *Epistolae*, 38, 1.

[11] See, *e. g.*, Emerson, *Friendship;* and Century Dictionary.

[12] *County of Mobile v. Kimball* (1880) 102 U. S. 691, 697.

transportation of persons or property. Does not this purpose, then, cover transactions like that in the principal case? It is difficult to see why it does not, for if such interstate transportation is not interstate commerce then one wishing to transport his own property for personal use from, say, New York to San Francisco might be subjected to all sorts of "conflicting and discriminating state legislation." For instance, suppose that A has a pleasure car which he never uses for "commercial" purposes and he wishes to drive it from New York to San Francisco for purely pleasure purposes. Could each state tax him for the mere privilege of crossing the state line? Or could the interlying states put prohibitive taxes on the flask of brandy which he carries in his pocket for the purpose of use in case of accident? It would seem clear that such transactions fall within the general purpose of the commerce clause and, hence, constitute interstate commerce.

Perhaps the most satisfactory judicial exposition of the term is the one recently quoted with approval by the United States Supreme Court in *International Textbook Co. v. Pigg.*[13] Said the court:

"Importation into one state from another is the indispensable element, the test of interstate commerce, and every negotiation, contract, trade and dealing . . . which contemplates and causes such importation whether it be of goods, persons or information is a transaction of interstate commerce."

The omitted words are, "between citizens of different states," but it seems quite clear that diverse citizenship has nothing to do with commerce. And, besides, the Supreme Court has recently held that transportation by the owner for himself, *i. e.,* transportation not "between citizens of different states" may be commerce.[14] In other words, as it was more concisely expressed by the United States Supreme Court in *Railroad Co. v. Husen,* [15] *"transportation* is essential to commerce or rather *is commerce* itself," *i. e.,* commerce in the constitutional sense is simply transportation (including transit and transmission) of persons or things. Moreover, this conception of the term commerce, *viz.,* as simply transportation of persons or things, seems to be carried out by the unbroken current of Supreme Court decisions. Thus, Mr. Justice Holmes, speaking for the United States Supreme Court, has said:[16] "Transportation for others as an independent business is commerce irrespective of the purpose to sell or retain the goods

[13] (1910) 217 U. S. 91, 30 Sup. Ct. 481. The quotation is from *Butler Shoe Co. v. United States Co.,* 156 Fed. 1.

[14] *The Pipe Line Cases* (1914) 234 U. S. 548, 34 Sup. Ct. 956.

[15] (1877) 95 U. S. 465, 470.

[16] *Hanley v. Kansas City, etc. Co.* (1903) 187 U. S. 617, 619; 23 Sup. Ct. 214, 215.

which the owner may entertain with regard to them. . . ." It is true that the learned justice says transportation *for others* is commerce, irrespective of the purpose, but the case was a case dealing with transportation for others, and a judge usually, and wisely, confines his language as nearly as possible to the facts of the case. Besides, the same learned justice, speaking for the same court, has subsequently held that the fact that the transportation is by and for the owner of the thing transported (*i. e.*, the fact that it is transportation not for others) does not prevent the transportation from being interstate commerce.[17] Hence, it would seem to follow that interstate transportation is interstate commerce, irrespective of the purpose of the transportation or of the person for whom the person or thing is transported.

Furthermore, apart from Congressional legislation, such as now exists,[18] it is settled law that a state cannot prevent a person from importing (through another) intoxicants for his own personal use, the reason being that such importation is interstate commerce.[19] But if the principal case is correct the state could without such congressional legislation prevent him from *personally* importing it into the state. In other words, if the principal case is correct, then what is admittedly commerce if done by an agent ceases to be commerce if done by the principal himself. But such a conclusion seems absurd, for certainly the essential nature of the transaction is the same whether it is done by the principal himself or by his paid agent.

In accord with the view herein expressed is the well-reasoned opinion of the Supreme Court of South Carolina in a case in which the facts were substantially the same as in the principal case but the conclusion reached was squarely *contra*. In that case[20] the defendants had purchased liquor in North Carolina and had transported it in their own buggy into South Carolina, for their own personal use. The court held that the transportation was interstate commerce, though it was transportation by the owner for his own non-commercial use. The only other case squarely in point seems to be *Alexander v. State*.[21] There, too, the accused had personally carried liquor into the state for his personal use, but the court did not hesitate to hold the transportation interstate commerce, although it was, as in the principal case, a transportation by the owner for a non-commercial purpose.

Text-writers, as a rule, have wholly ignored the precise point raised in the principal case and do not cite either of the two cases last con-

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[17] *The Pipe Line Cases, supra.*

[18] See COMMENT, *The Webb-Kenyon Act and Interstate Commerce* (1917) 26 YALE LAW JOURNAL, 399.

[19] *Vance v. W. A. Vandercook* (1898) 170 U. S. 438, 18 Sup. Ct. 674.

[20] *State v. Holleyman, supra.*

[21] *Supra*, note 3.

sidered. But upon principal and such authority as there is, it is submitted that the distinction taken in the principal case and suggested in the above-mentioned periodicals cannot be supported; that it is not practical to draw any distinction between transportation by the owner for so-called "commercial" and transportation by the owner for so-called "non-commercial" purposes; that each is commerce in the constitutional sense; that to hold so does violence neither to language nor to legal principle, but rather gives full effect to the "largest import" of the term commerce, enables Congress to regulate evils which would seem to fall clearly within the general purpose of the commerce clause, and finally, while effectuating complete justice, avoids the adoption of a wholly impractical and unnecessary limitation to a just and practical general rule.

T. P. H.

THE ACT OF STATE DOCTRINE APPLIED TO ACTS OF MEXICAN REVOLUTIONISTS

The United States Supreme Court in two recent decisions has made an interesting application of the Act of State doctrine. *Oetjen v. Central Leather Co.* (1918) 38 Sup. Ct. 309; *Ricaud v. American Metal Co.* (1918) 38 Sup. Ct. 312. Both cases arose out of the acts of a military commander of the Constitutionalist Army in Mexico. In the first case personal property of a Mexican citizen had been seized for non-payment of a military contribution duly levied, and in the second case personal property claimed to have been owned by an American corporation had been seized on military requisition. In both cases, the property was sold by the military commander to an American citizen, who brought it into the United States, and suit for the recovery of the property was instituted—in the first case, by the American assignee of the original Mexican owner, and in the second case, by the alleged original American owner. The court was asked to decide upon the conflicting claims of title of two American citizens.

The lower court in the first case[1] decided that by the seizure and sale of the military commander title passed to the defendants, on the ground that war existed, that the contribution was properly levied under the laws of war, and that a sale of an inhabitant's property, for failure to pay the contribution assessed against him, was valid. That is, the court examined the legality of the seizure and sale according to the rules of international law.

The United States Supreme Court proceeded on an entirely different theory. It refused to examine the legality of the seizure and sale. It

[1] *O'Neill and Oetjen v. Central Leather Co.* (1915, Ct. Err.) 87 N. J. L. 552, 94 Atl. 789.